HLG Capital Bhd (now known as Hong Leong Capital Bhd) v Andrew Chuah Khim Peik

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–175–10 OF 2016
AZIZAH NAWAWI J
31 JULY 2018

Administrative Law — Judicial review — Certiorari to quash award of Industrial Court — Applicant terminated respondent on grounds of poor performance — Respondent's dismissal held by Industrial Court as without just, cause or excuse — Whether Industrial Court applied wrong test — Whether test applicable to all employees — Whether Industrial Court failed to take relevant considerations

This was an application for an order for certiorari to quash Award No 805 of 2016 dated 14 July 2016 ('the award'). The respondent commenced his employment with the applicant ('the company') as the group financial controller on 2 February 2006. The company took the position that the respondent's standard of performance thereafter deteriorated over the subsequent years, raising the concerns of the company over his ability and competency to perform the roles and responsibilities expected of him. The company's position was that the respondent's conduct and behaviour displayed poor leadership skills and judgment and questions were accordingly raised over his leadership, competency and integrity. As such, the company had terminated the respondent's services with effect from 18 June 2009. Dissatisfied with the termination, the respondent then filed a complaint with the Industrial Relations Department pursuant to s 20 of the Industrial Relations Act 1967. The Industrial Court subsequently handed down the award and held that the respondent's dismissal was without just cause or excuse, and ordered the company to pay the respondent a total sum of RM314,145.52. Hence, this application by the company.

Held, allowing the application with costs:

(1) The Industrial Court in applying the general test to prove poor performance of the employees had applied the wrong test. Before the company could dismiss the respondent based on his poor performance, there was no requirement that the company must prove sufficient written notice was given to the respondent about his poor performance, that the respondent had accorded sufficient opportunity to improve, and that despite the said opportunities, the respondent still failed to improve his

performance. As such, the Industrial Court had made an error in law in applying the general test to a senior management employee (see paras 20–21).

(2) The Industrial Court had failed to take into consideration the evidence of the company's witnesses, that the company's top management had lost confidence in the respondent to continue to lead the financial aspect of the group. The law on poor performance required the employer to show that it was genuinely dissatisfied with the employee. The employer was not required to prove the actual poor performance by the employee. It could not be said that the evidence of the company to establish the respondent as incapable or incompetent was merely based on rumours. Senior management officers had given evidence before the Industrial Court that the respondent was incapable of performing to the expectations required by the company of its group financial controller (see paras 24, 27 & 30).

(3) The Industrial Court had committed errors in law with regards to the test to be applied to establish poor performance by a member of the senior management team. Added to that, the Industrial Court had failed to take relevant considerations and had reached a decision that was perverse, which justified the quashing of the award (see para 32).

[Bahasa Malaysia summary

Ini adalah permohonan untuk perintah certiorari supaya membatalkan Award No 805 Tahun 2016 bertarikh 14 Julai 2016 ('award'). Responden memulakan pekerjaannya dengan pemohon ('syarikat') sebagai Group Financial Controller pada 2 Februari 2006. Syarikat itu mengambil kedudukan bahawa standard prestasi responden selepas itu merosot pada tahun-tahun berikutnya, meningkatkan kebimbangan syarikat terhadap keupayaan dan kecekapan untuk melaksanakan peranan dan tanggungjawab yang diharapkan darinya. Syarikat berhujah bahawa kelakuan dan tingkah laku responden menunjukkan kemahiran kepimpinan yang rendah dan penghakiman serta persoalan yang sewajarnya ditimbulkan terhadap kepimpinan, kecekapan dan integriti beliau. Oleh itu, syarikat itu telah menamatkan perkhidmatan responden berkuatkuasa 18 Jun 2009. Tidak berpuas hati dengan penamatan itu, responden kemudian memfailkan aduan dengan Jabatan Perhubungan Perusahaan menurut s 20 Akta Perhubungan Perusahaan 1967. Mahkamah Perusahaan kemudiannya telah memberikan award dan memutuskan bahawa pemecatan responden itu adalah tanpa sebab atau alasan yang adil, dan memerintahkan syarikat itu membayar responden sebanyak RM314,145.52. Oleh itu, permohonan ini oleh syarikat tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Mahkamah Perusahaan dalam menggunakan ujian am untuk

membuktikan prestasi buruk pekerja telah menggunakan ujian yang salah. Sebelum syarikat itu dapat memecat responden berdasarkan prestasi buruknya, tidak ada keperluan bahawa syarikat mesti membuktikan notis bertulis yang mencukupi diberikan kepada responden tentang prestasi buruknya, bahawa responden telah memberikan peluang yang mencukupi untuk diperbaiki, dan walaupun diberi peluang, responden masih gagal memperbaiki prestasinya. Oleh itu, Mahkamah Perusahaan telah membuat kesilapan dalam undang-undang dalam menggunakan ujian am kepada pekerja kanan pengurusan (lihat perenggan 20–21).

(2) Mahkamah Perusahaan gagal mengambil kira keterangan saksi-saksi syarikat, bahawa pengurusan atas syarikat telah hilang keyakinan terhadap responden untuk terus memimpin aspek kewangan kumpulan itu. Undang-undang mengenai prestasi buruk memerlukan majikan menunjukkan bahawa ia benar-benar tidak berpuas hati dengan pekerja. Majikan tidak dikehendaki membuktikan prestasi sebenar yang buruk oleh pekerja. Tidak dapat dikatakan bahawa keterangan syarikat itu untuk membuktikan responden sebagai tidak mampu atau tidak cekap hanya berdasarkan khabar angin. Pegawai pengurusan kanan telah memberi keterangan di hadapan Mahkamah Perusahaan bahawa responden tidak dapat melakukan apa yang diharapkan oleh syarikat terhadap *group financial controller* (lihat perenggan 24, 27 & 30).

(3) Mahkamah Perusahaan telah membuat kesilapan dalam undang-undang berkaitan dengan ujian yang akan digunakan untuk membuktikan prestasi buruk oleh ahli pasukan pengurusan kanan. Tambahan lagi, Mahkamah Perusahaan gagal mengambil pertimbangan yang relevan dan telah mencapai keputusan yang salah, yang membenarkan pembatalan award itu (lihat perenggan 32).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 318–518.

Cases referred to

Alidair Ltd v Taylor [1978] ICR 445, CA (refd)

Choong Poh Ling v CIMB Aviva Assurance Berhad [2016] 2 LNS 1032, IC (refd)

Lam Yue Choong v F&N Dairies (M) Sdn Bhd [2005] 2 LNS 1832, IC (refd)

MCI Worldcom Malaysia Sdn Bhd v Sultan Askin Mydin Meera [2007] 2 LNS 2267, IC (refd)

OMNI Precision Sdn Bhd v Tan Boon Leong [2006] 2 LNS 922, IC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor [2000] 1 MLJ

A 107; [2000] 1 CLJ 180, HC (refd)
Tan Cheng Leng v Tropicana Medical Centre (M) Sdn Bhd [2017] ILJU 16; [2017] 1 ILR 383, IC (refd)

Legislation referred to

B Industrial Relations Act 1967 s 20

Sivabalah Nadarajah (Reena Enbasegaram with him) (Shearn Delamore & Co) for the applicant.
Balan S Nair (Elaina Teng with him) (Seah Balan Ravi & Co) for the respondent.

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Azizah Nawawi J:

APPLICATION

D **[1]** This is an application for an order for certiorari to quash Award No 805 of 2016 dated 14 July 2016 ('the award'). In the said award, the Industrial Court has held that respondent's dismissal was without just cause or excuse, and ordered the applicant to pay the respondent a total sum of RM314,145.52.

E **[2]** Having considered the application and the submission of the parties, this court has allowed the application with costs.

THE SALIENT FACTS

F **[3]** The applicant ('the company') is a company incorporated in Malaysia. The company is a member of the Hong Leong Group of Companies ('the HLG Group').

G **[4]** The respondent commenced his employment as the group financial controller on 2 February 2006 with a monthly salary of RM13,000. He was confirmed in his position with effect from 3 August 2016 after a probationary period of six months.

H **[5]** The company takes the position that the respondent's standard of performance thereafter deteriorated over the subsequent years, raising the concerns of the company over his ability and competency to perform the roles and responsibilities expected of him as the group financial controller.

I **[6]** The company states that as the group financial controller, the respondent was expected to demonstrate leadership and people skill sets, with an ability to work with employees of all levels and to increase the efficiency of finance department and resolving conflicts and issues at work.

[7] However, the company's position is that the respondent's conduct and behavior displayed poor leadership skills and judgment and questions were accordingly raised over his leadership, competency and integrity. As such, the company had terminated the respondent's services with effect from 18 June 2009 vide a letter dated 17 June 2009, which, inter alia, reads:

> ... since your last review/bonus letter meeting with the Chief Financial Officer, we have seen no improvement in your overall performance. You have not performed and carried out your duties expected of a Group Financial Controller over a period of time. The fundamental superior/subordinate and peer group relationships have broken down. You are unable to command confidence and trust expected of a senior member of the management team. In addition, the company is of the view that you lack the leadership and management capabilities and the competencies expected of your position, especially now that there is an Investment Bank within the HLG Capital Group ...

[8] Dissatisfied with the termination, the respondent then filed a complaint with the industrial relations department pursuant to s 20 of the Industrial Relations Act 1967. The respondent's complaint was thereafter referred by the Minister for Human Resources for adjudication before the Industrial Court.

[9] The Industrial Court subsequently handed down the award dated 14 July 2016 and in its award, the Industrial Court held that the respondent's dismissal was without just cause or excuse, and ordered the company to pay the respondent a total sum of RM314,145.52.

[10] Hence, the company filed this application for an order of certiorari to quash the said award.

THE FINDINGS OF THE COURT

[11] The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 has set out the function of the court in an application for judicial review and the correct test to be applied in reviewing findings of fact made by the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*
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> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the

reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, *it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.*

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97). However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba* [1998] 2 MLJ 372).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.* (Emphasis added.)

[12] Bearing in mind the above principles, I will now deal with the company's submission that the Industrial Court, in handing down the award had committed errors of law and had acted in excess of jurisdiction because the Industrial Court:

(a) had taken irrelevant matters into consideration;

(b) had failed to take relevant matters into consideration; and

(c) had reached a decision so perverse that no reasonable tribunal similarly circumstanced would have reached it.

[13] The first issue raised by the company is that the Industrial Court had applied the wrong test, in determining whether the dismissal of a high ranking officer on the grounds of poor performance is with just cause and excuse.

[14] In the award, the Industrial Court has formulated the test to be as follows at pp 17–18:

> The law with regard to proof that proper procedure must be followed in cases of poor performance, and where *there must be sufficient written communications to the claimant* on it established and very clear in its requirements.
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> ...
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> It is for the company to also *prove poor performance on the balance of probabilities and in doing so, the claimant has been warned about his poor performance, that he was accorded sufficient opportunity to improve, and that despite so he failed to improve his performance*. (Emphasis added.)

[15] Therefore, the test applied by the Industrial Court is that the onus lies with the company to prove poor performance on the balance of probabilities, and in so doing, the company must establish that:

(a) there must be sufficient written notice to the employee about his poor performance;

(b) he was accorded sufficient opportunity to improve; and

(c) despite the above, the employee has failed to improve his performance.

[16] However, the issue here is whether the above test is applicable to all employees, including that from senior management, such as the respondent in this case, being the Group Financial Controller.

[17] I am of the considered opinion that a person employed in senior management should be fully aware of what is required and expected of him. Persons in senior management are usually persons with vast experience and will also bring along such experience into their new job. Therefore, such persons should already know the standard of job performance/requirement that is required from him. As such, he must be deemed to be fully aware of what was required and expected of him without any need for warning or reprimand by his superior. Therefore, it goes without saying that the opportunity for improvement should be considered less apparent for these persons in senior management (see *OMNI Precision Sdn Bhd v Tan Boon Leong* [2006] 2 LNS 922; *MCI Worldcom Malaysia Sdn Bhd v Sultan Askin Mydin Meera* [2007] 2 LNS 2267).

[18] In *Lam Yue Choong v F&N Dairies (M) Sdn Bhd* [2005] 2 LNS 1832,

the court held that:

> The claimant also complained that no warnings whatsoever whether verbal or written were ever given to him. But what sort of warning is the Claimant referring to or expecting? Warnings to buckup or otherwise booted out? But he is not an ordinary run-of-the-mill type of employee. He is the deputy divisional general manager of the Ice Cream Division drawing more than RM16,000K plus other and enviable benefits. In his position, he should know what to do without the prodding of his superiors or his superiors having to wield the big stick all the time ... It shudders me to think that in his position, he is expecting to be given the same treatment as that given to other ordinary lowly paid and positioned employees. Indeed I subscribed to the aged-old established authorities that the requirement for warnings or notices to employees in such high ranking position is much less apparent or effective.

[19] In *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 MLJ 107; [2000] 1 CLJ 180, the court held as follows:

> ... it cannot be disputed that the applicant was *holding a senior management position and he was expected to know the standard of job performance required of him. He therefore cannot plead or seek refuge in his purported ignorance of what was expected from him by the second respondent. This is a trite principle of Employment Law in cases concerning poor performance of senior employees. The principal was put as follows by Sir John Donaldson, who in James v Waltham Holy Cross UDC* [1970] ICR 398 said:
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> > *.... But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent.* (Emphasis added.)

[20] Therefore, I am of the considered opinion that the Industrial Court has applied the wrong test in this case. The Industrial Court had applied the general test to prove poor performance of the employees. However, in this case, the respondent is not a lower rank employee who may need persistent supervisions and warnings. The respondent here is a senior management officer who should know the expectation of his employer and the performance standards befitting that of his post as the financial controller of the group.

[21] Therefore, I am of the considered opinion that before the company can dismiss the respondent (a senior management officer) based on his poor performance, there is no requirement that the company must prove sufficient written notice was given to the respondent about his poor performance, that the respondent had accorded sufficient opportunity to improve, and that despite the said opportunities, the respondent still failed to improve his performance. As such, I find that the Industrial Court has made an error in law in applying the general test to a senior management employee.

[22] As such, the test to be applied in respect of senior management employees is that it is sufficient for the company to establish that the upper management of the company, in the absence of bad faith, was dissatisfied with the employee in question and that the same had been brought to his attention.

[23] The company's witnesses before the Industrial Court have given evidence that the respondent was incapable of performing to the expectations required by the company of its group financial controller. Essentially, the company takes the position that they have found the respondent to be lacking in leadership and management capabilities and competencies expected of a person holding his position. The company also find that the respondent was unable to command the confidence and trust expected of a senior member of the management team, leading to the management losing confidence and trust in him as the group financial controller.

[24] I am of the considered opinion that the Industrial Court has failed to take into consideration the evidence of the company's witnesses, that the company's top management had lost confidence in the respondent to continue to lead the financial aspect of the group. I find that the evidence of the company's witnesses, COW1 (chief financial officer), COW2 (head of operations), COW3 (head of dealing) and COW4 (finance manager) which represents the company's subjective evaluation of the respondent's performance is a relevant consideration which the Industrial Court has failed to take into consideration.

[25] In *Alidair Ltd v Taylor* [1978] ICR 445, Lord Denning said at p 451:

> ... whether a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.

[26] The principle in *Alidair Ltd* has been applied by the Industrial Court in *Choong Poh Ling v CIMB Aviva Assurance Berhad* [2016] 2 LNS 1032 and *Tan Cheng Leng v Tropicana Medical Centre (M) Sdn Bhd* [2017] ILJU 16; [2017] 1 ILR 383, where the Industrial Courts have held that performance by its very nature is subjective and the best person to judge an employee's performance should be the employer.

[27] Therefore, the law on poor performance requires the employer to show that it is genuinely dissatisfied with the employee. The employer is not required to prove the actual poor performance by the employee, as held by the Industrial Court in this case, where it has held that 'it is for the company to prove poor performance on a balance of probabilities'. Again, the Industrial Court had applied an erroneous test.

[28] However, on the issue of evidence, the Industrial Court finds that COW1's evidence that the top management believes that respondent was incapable of performing to the expectations required by the company of its group financial controller, 'was not seen and experienced by COW1 on a first-hand basis' but based on rumour from the respondent's peers, his subordinates and a few managers. At p 14 of the award, the Industrial Court made the following finding:

> Based on the above, the idea that the claimant was a poor performer was not seen and experienced by COW1 on a first hand basis. *Instead he had also listened to rumours*, ie what the claimant's peers and subordinates said to him about the claimant, and what a few senior managers had complained to him. At most, the charges against the claimant were made as an afterthought because of such complaints by a few senior management people (mentioned in detail hereafter) and their obvious dislike of the claimant for the manner in which he carries out his tasks as the group financial controller.

[29] The above finding is perverse as the Industrial Court is merely making a finding based on COW1 evidence in isolation, without looking at the corroborative evidence given by COW2 who gave evidence of the respondent's inability to provide solutions and solve problems, COW3 evidence on the respondent's lack of corporation and inability to provide support to his colleagues and other departments, and the evidence of COW4 on the respondent's lack of man-management and human skills.

[30] All these witnesses have confirmed that they have raised their complaints about the respondent to the upper management for further action. Therefore, it cannot be said that the evidence of the company to establish the respondent as incapable or incompetent is merely based on rumours. Senior management officers have given evidence before the Industrial Court that the respondent was incapable of performing to the expectations required by the company of its group financial controller.

[31] I am also of the considered opinion that the Industrial Court's finding is against the evidence before the Industrial Court that the company's dissatisfaction with the respondent is bona fide, as can be seen from the following evidence:

(a) the letter of bonus/increment dated 14 December 2007, whereby the respondent's increment was only 3.6%, which is below the average salary increment of 4.8%;

(b) in the said letter dated 14 December 2007, the respondent was only given a three months' bonus, which was below the average bonus pay out of 6.5 months. These reflected the company's dissatisfaction with the respondent's performance;

(c) that the company's letter on bonus or increment dated 15 December 2008 which advised the respondent that he was getting zero bonus and zero implement for the year 2009; and

(d) that COW1, the chief financial officer of the group, the respondent's immediate superior who was involved in the decision to terminate the respondent's service, had given evidence that the low bonus and increment that the respondent received at the end of 2007 was reflective of his assessment of the respondent.

CONCLUSION

[32] Premised on the reasons enumerated above, I am of the considered opinion that the Industrial Court had committed errors in law with regards to the test to be applied to establish poor performance by a member of the senior management team. Added to that, I find that the Industrial Court had failed to take relevant considerations and had reached a decision that is perverse, which justifies the quashing of the award.

Application allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh